IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7822 OF 2006

Rajkumar Kawadamal Chhabada,)
Age: 46 years, Occ: Trader,)
R/o.1772, A-Ward, Tarabai Road,)
Kolhapur.) ...Petitioner

Versus

The Mohamaden Education Society,)
Having office at Dasara Chowk,)
Opp. Statute of Shahu Maharaj,)
C-Ward, Kolhapur.) ...Respondent

Shri N.V.Bandiwadekar for the Petitioner.

Shri P.R. Arjunwadkar for the Respondent.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 27, 2007.

JUDGMENT:

1. Submissions of the learned counsel appearing for the parties were heard on 06th March, 2007. By this Petition under Article 227 of the Constitution of India, the challenge is to the order dated 04th September, 2006 passed by the learned IIIrd Joint Civil Judge, Senior Division at Kolhapur below Application at Exhibit 15 in Regular Darkhast No.503 of 2004.

2. It will be necessary to refer to the facts of the case in brief. A decree for possession was passed in Regular Civil Suit No.975 of 1983 in favour of the Respondent. The Respondent herein who was the Plaintiff

executed the said decree and obtained possession of the suit premises. The Petitioner filed Regular Civil Suit No.130 of 1992 against the Respondent for declaration that the exparte decree was void ab initio and not binding on him. A prayer was made in the said suit for restoration of possession. The Petitioner also filed an Application under Order XXI Rule 99 of the Code of Civil Procedure, 1908 for restoration of possession. The trial Court decreed the declaratory suit filed by the Petitioner and held that the decree passed in Regular Civil Suit No.975 of 1983 was null and void. The trial Court also allowed Application No.59 of 1992 under Order XXI Rule 99 of the said Code and directed restoration of possession.

3. Regular Civil Appeal No.308 of 1996 was preferred by the Respondent for challenging the decree passed in Regular Civil Suit No.130 of 1992. A separate Appeal being Regular Civil Appeal No.309 of 1999 was preferred by the Respondent in the District Court for challenging the order of restoration of possession passed in Misc. Civil Application No.59 of 1992. Both the said Appeals were dismissed for default. On an Application made by the Respondent, the Regular Civil Appeal No.308 of 1996 was restored. However, no application was made for restoration of the Regular

Civil Appeal No.309 of 1996. Regular Civil Appeal No.308 of 1996 was dismissed and the decree of declaration passed by the trial Court was confirmed. Second Appeal No.252 of 2004 was filed by the Respondent for challenging the decree passed in Regular Civil Appeal No.308 of 1996 as well as in Regular Civil Suit No.130 of 1992. Civil Application No.550 of 2004 was filed in the said Second Appeal for stay. The Second Appeal was admitted and Application for stay was allowed. The Petitioner filed Regular Darkhast No.503 of 2004 for execution of the order of restoration passed in Misc. Civil Application No.59 of 1992. An Application was filed by the Respondent herein for stay of Darkhast Application till the Second Appeal No.252 of 2004 was decided. By the impugned order dated 04th September, 2006 the said Application has been allowed.

4. The submission of the learned Advocate for the Petitioner was that this Court while passing an order on stay Application in the Second Appeal No.252 of 2004 specifically clarified that the order passed in Misc. Civil Application No.59 of 1992 was not stayed and therefore, the order passed by the executing Court is perverse and deserves to be set aside. The submission of the learned Advocate for the Respondent was that as legality and validity of the decree passed in Regular

Civil Suit No.975 of 1983 is subject matter of the Second Appeal in this Court, the executing Court was justified in staying its hands.

5. I have considered the submissions. It will be necessary to refer to the order passed by this Court in Civil Application No.550 of 2004 which was the Application for stay filed by the Respondent in Second Appeal No.252 of 2004. In paragraph Nos.4 and 5 of the order dated 17th August, 2004 this Court has observed thus:

> "4. However, in the present case, I am not concerned with Regular Civil Appeal No.309 of 1996 or with the order passed in Miscellaneous Application No.59 of 1992. The subject matter of the present Appeal is Decree passed in Regular Civil Suit No.130 of 1992 and confirmation thereof by the District Court in Regular Civil Appeal No.308 of 1996.
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> 5. The Respondent had taken recourse to a remedy by filing an application under order 21 Rule 99 of the Code of Civil Procedure, 1908. Prima facie it appears to me that the suit filed by the Respondent was not maintainable.

> In view of this position the Decree of declaration passed by the trial Court will have to be stayed. Hence, Civil Application is disposed of by directing that the execution and operation of Decree of declaration granted by the trial Court in Regular Civil Suit No.130 of 1992 will remain stayed till the final disposal of the Second Appeal. It is made clear that I have not considered the merits of order passed in Miscellaneous Application No.52 of 1992 therefore no interim relief is granted as regards order passed in the said application. There will be no orders as to costs".

6. Order of this Court is expressly clear. It records that grant of stay is confined to decree passed in Regular Civil Suit No.130 of 1992. It is clarified that no interim relief has been granted as regards the order passed in Misc. Civil Application No.59 of 1992. It is thus obvious that this Court never intended to grant stay of execution of order of restoration of possession passed in Misc. civil Application No.59 of 1992. In view of the aforesaid order, there was no occasion for the executing Court to stay execution proceedings.

7. Hence, I pass the following order:

(i) The impugned order dated 04th September, 2006 is quashed and set aside.

(ii) Application at Exhibit 15 in Regular Darkhast No.503 of 2004 stands dismissed.

(iii) The executing Court will now proceed with the execution Application in accordance in law.

JUDGE